APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation

Plaintiff,

v.

33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, et al., and UNKNOWN OWNERS,

Defendants.

No. CV 79-3709-RJK

MEMORANDUM OF DECISION AND ORDER

This is an action in eminent domain brought by plaintiff Southern California Edison Company, pursuant to 25 U.S.C. § 357, to condemn a right-of-way for electrical transmission lines across land allotted to Indians. The Act requires that the United States be named as a party since it holds the land in trust for the Indians. Plaintiff seeks use of the property for construction of powerlines and for the necessary access roads and facilities to maintain those lines.

The complaint in this action was filed on September 25, 1979. The Indians to whom the land was allotted filed an answer on December 31, 1979. The United States filed a Notice of Appearance on December 17, 1979. Defendant Wingate Air Conditioning filed a Notice of Appearance on January 24, 1980. No other defendant, including the State of California, has filed an answer or otherwise appeared.

On April 11, 1980, defendants Rice, et al. filed a motion to dismiss this action on the grounds (1) this Court lacks subject matter jurisdiction over this action because all condemnation actions brought pursuant to California law allegedly must be brought in state court; (2) the complaint fails to state a claim because it fails to make the allegations regarding comparative public uses of the land in question; (3) this Court should abstain from applying the provisions of the newly-enacted California eminent domain law until such statutes are first construed by the state courts; and that 25 U.S.C. § 357 is not available for the acquisition of a right-of-way across land held by Indians in the form of allotments. On April 17, 1980, plaintiff filed an opposition. Defendants filed a reply on April 21.

On April 18, 1980, plaintiff filed a motion for partial summary judgment, noticed for May 5, 1980. Essentially, plaintiff's motion seeks adjudication of all issues regarding plaintiff's right and power to acquire the right-of-way in question pursuant to 25 U.S.C. § 357, with the exception of determination of the amount of just compensation for the taking of the property. On April 30, 1980, defendants Rice, et al. filed an opposition. Because the two motions were addressed to the same issues and likely would result in a disposition on the merits in favor of one or the other party, the motions were submitted together as of May 5, 1980 and are treated together here.

Issues Presented

I. Defendants Rice, et al. Motion to Dismiss

(1) Whether this Court has subject matter jurisdication over this condemnation action brought pursuant to 25 U.S.C. § 357;

(2) Whether 25 U.S.C. § 357 may be used here to acquire a right-of-way across Indian lands by way of condemnation, or whether the procedures set forth in 25 U.S.C §§ 323-324 — requiring approval of the Secretary of the Interior and consent of the affected Indians — must be utilized instead;

(3) Whether this Court should abstain from applying the provisions of the newly-enacted California eminent domain law until such statutes are first construed by the state courts;

(4) Whether the complaint fails to state a claim because it fails to make allegations regarding the public use for which the land is sought as compared with the public use to which the land is currently being devoted.

II. Plaintiff's Motion for Partial Summary Judgment

Whether a genuine issue exists as to any material fact regarding the proper procedure for acquisition of the right-of-way in question here, and whether such acquisition should occur pursuant to the procedure set forth in 25 U.S.C § 357 — judicial condemnation of Indians lands — or, instead, pursuant to 25 U.S.C. §§ 323-324 — acquisition conditioned upon approval of the Secretary of the Interior and consent of the Indians who are affected.

I. Defendants Rice, et al. Motion to Dismiss

This action is brought by plaintiff Southern California Edison Company, a public utility which, pursuant to CAL. PUBLIC UTILITIES CODE § 614, "may condemn any property necessary for the construction and maintenance of its electric plant." Plaintiff brings this action pursuant to 25 U.S.C. § 357, which provides: "Land allotted in severalty to Indians may be condemned for any public purpose under the Laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Defendants Rice, et al. raise a number of grounds in support of their motion to dismiss. First, defendants contend

that this Court lacks subject matter jurisdiction over this action because all condemnation actions brought pursuant to California law supposedly must be brought in state court. Defefendant cites CAL. CODE CIV. PROC. § 1250.010 which provides that, with certain enumerated exceptions, all eminent domain proceedings shall be brought in state superior court. Defendants misapprehend the import of 25 U.S.C. § 357. Section 357 creates a federal right of action for condemnation of Indian land, but, as part of the substantive law to be applied, chooses to incorporate California law regarding eminent domain. Such incorporation fails to defeat plaintiff's federal right of action, and hence subject matter jurisdiction exists in this Court.

Second, defendants contend that plaintiff should have proceeded under 25 U.S.C. §§ 323-324, rather than under 25 U.S.C. § 357, and hence this Court lacks jurisdiction to consider plaintiff's claim. Since the propriety of plaintiff's reliance upon § 357 is the basic issue to which plaintiff's motion for partial summary judgment is addressed, discussion of this issue will be reserved until consideration of plaintiff's motion, which is based upon an agreed statement of facts.

Third, defendants contend that the Court should abstain from application of the California eminent domain provisions because such provisions are newly-enacted and have not been subject to extensive consideration and interpretation by the California state courts. However, defendants can point to no provision whose novel and intricate character is such that this Court should abstain indefinitely pending its interpretation.

Fourth, defendants allege that plaintiff fails to state a claim in that the complaint fails to allege, as required under California law, that the public use for which the land is sought to be condemned (a) will not impair the public use to which the land is currently being put and (b) is a more necessary public use than the public use to which the land is currently being devoted. Consideration of this issue is reserved until after determination of the propriety of plaintiff's use of the procedure set forth in 25 U.S.C. § 357.

II. Plaintiff's Motion for Partial Summary Judgment

The following facts are undisputed and are set forth in a stipulation of the parties. Plaintiff is a public utility authorized by the State of California to engage in the business of purchasing, generating, transmitting, distributing, and selling of electricity to customers in California. The property which is the subject of this condemnation action is being acquired for a public purpose under the laws of California. The property is being sought for the following public uses: electric power lines, electric heat lines, and electric light lines necessary to supply electric light, heat, and power to its customers, together with byroads to reach such lines.

The nature of the rights-of-way and easements sought may be stated generally as follows: rights to construct and maintain overhead electric transmission lines, together with supports therefor; right to pass on, over, and along, the land in question by means of vehicles and foot to aid such construction and maintenance; right to prohibit the building of any structure by defendants on said land; and right to construct and maintain such roads as are necessary to provide access to the site of such powerlines. The parties further agree that the real property which is the subject of this action is accurately described in Paragraph 10 of the complaint and that the names of all defendants with interests in the property being sought are listed in Paragraph 11 of the Complaint.

Defendants Miller, Miranda, Nelson, Preckwinkle, Rice, and Ward are members of the Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian tribe. Pursuant to Patent Nos. 1223349, 1223336, 1223323, 1223322, 1223347, issued on October 12, 1961, the United States declared that it "does and will hold the land thus allotted . . . in trust for the sole use and benefit of" defendants Rice, Miller, Miranda, Ward, Preckwinkle, and Nelson, respectively, pursuant to the Act of September 21, 1959, 73 Stat. 602, 25 U.S.C. § 951 *et seq*. The parties agree that the real

property in question is land allotted in severalty to the individual Indian defendants.

Finally, it is undisputed that on July 17, 1979, the California Public Utilities Commission issued a Certificate of Public Convenience and Necessity in Decision No. 90552 to Southern California Edison Company to construct the Devers-Palo Verde 500 KV Transmission Line which is the project for which the property in question is being condemned. By issueance of this Certificate, the California Public Utilities Commission found that this project is essential to meet future public convenience and necessity.

The basic issue for determination by the Court is whether the proper procedure for acquisition of the rights-of-way and easements herein sought is that set forth in 25 U.S.C. § 357 — judicial condemnation of Indian lands — or, instead, that set forth in 25 U.S.C. §§ 323-324 — acquisition of rights-of-way over Indian lands conditioned upon approval of the Secretary of Interior and upon the consent of the Indians whose land is affected. Section 323 set forth the following procedure:

> "The Secretary of Interior ... is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation by individual Indians or Indian tribes, communities, bands, or nations ... and any other land heretofore or hereafter acquired or set aside for the use and benefit of Indians."

Section 324 adds the following requirement:

> "No grant of a right-of-way over and across any lands belonging to a tribe ... shall be made without the conset of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant

> will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds that it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof."

The gist of the dispute between the parties as to this issue is as follows. Plaintiff contends that the Section 357 judicial condemnation procedure and the Sections 323 and 324 procedure conditioned upon approval of the Secretary and the affected Indians are mere alternative paths, both of which are equally applicable to context at hand. Defendants Rice, et al., on the other hand, maintain that the procedure set forth in Sections 323 and 324 is the exclusive means by which plaintiff may acquire any interest in their lands. Therefore, defendants conclude that this Court lacks subject matter jurisdiction to consider this action because plaintiff has brought its claim pursuant to a procedure inapplicable to the case at hand, namely the procedure under Section 357.

Defendants must confront, and distinguish, what seems to be a controlling precedent in the Ninth Circuit: *Nicodemus v. Washington Water Power Company*, 264 F.2d 614 (9th Cir. 1959), *rehearing den.* (1959), a case whose facts are nearly identical to those in the case at hand. *Nicodemus* involved an effort by an Idaho utility to gain condemnation, pursuant to 25 U.S.C. § 357, of an easement for the construction and maintenance of an electric transmission line over and along a tract of land which was allotted in severalty to a member of an Indian tribe, with the title to such tract being held in trust for such Indian by the United States. One of the contentions raised by the Indian landholder therein was that the decree of condemnation was invalid as being procured without the permission of the Secretary of Interior. There, as here, the Indian landholder contended that the procedure set forth in Section 323 should have been followed instead of that set forth in Section 357. The Ninth Circuit ruled: "In our opinion Section 323 and Section 357 offer two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line. The United

States has consented to both methods. * * * We hold that the appellee [power company] was not required to secure the permission of the Secretary of the Interior before initiating the condemnation suit under Section 357." 264 F.2d at 618.

The *Nicodemus* Court relied upon *United States v. State of Minnesota*, 113 F.2d 770 (8th Cir. 1940), which involved the issue of whether the State of Minnesota could acquire, by way of 25 U.S.C. § 357, an easement over allotted land for the establishment of a public highway, without having first secured the approval of the Secretary of Interior for the establishment of such a highway through the allotted Indian land as required under 25 U.S.C. § 311. The Eight Circuit reasoned:

> "The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. * * * The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highways. Section 3, 25 U.S.C.A. § 357, authorizes the maintenance of condemnation proceedings. * * * By Section 4 of the Act, 25 U.S.C.A. § 311, the Secretary is authorized to grant permission for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods. So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other." 113 F.2d at 773.

In *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 214-215, 63 S. Ct. 534, 538 (1943), the U.S. Supreme Court distinguished between the condemnation procedure set forth in Section 357 and the procedure set forth in Section 311 requiring approval of the Secretary for the construction of a highway (analogous to Section 323) as follows: "We think Congress employed this language in the Act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Section 3 [of the 1901 Act, codified as 25 U.S.C § 357] made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 [of 1901 Act, codified as 25 U.S.C. § 311] made both reservations and allotted lands subject to highway permits by the Secretary."

Finally, in *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10 Cir. 1977), *rehearing den.* (1977), *cert. den.*, 435 U.S. 1006, 98 S. Ct. 1876 (1977), an action brought by a pipeline company to condemn lands allotted in severalty to Indians, the Tenth Circuit adopted the view that the procedure set forth in § 357 and that set forth in §§ 323-324 are alternative, equally permissible means applicable to the same end — acquisition of a right-of-way over Indian land allotted in severalty. The Court reasoned: "[T]he consent of the Secretary is required in order for a state to acquire the rights of way across allotted lands under 25 U.S.C. §§ 311, 312, 319, 321, 323, but § 357 does not impose such a requirement. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959); *United States v. Oklahoma Gas & Elect. Co., supra.* Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required."

The gist of defendants' response is that *Nicodemus* is not controlling here. First, defendants cite much authority for the general proposition that federal law relating to Indian affairs has always been applied in a manner as favorable to the Indians as possible. *E.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975) (" ... ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the indians.") Second, defendants maintain that 25 U.S.C. §§ 323-324 has implicity limited the applicability of § 357 to the acquisition of rights-of-way over Indian lands. Defendants contend that because §§ 323-324 were adopted some forty years after § 357, and because §§ 323-324 specifically relate to rights-of-way over Indian lands — as contrasted with § 357 which is merely a general condemnation provision for Indian lands — the procedure set forth in §§ 323-324 should have been followed by plaintiff here. Defendants rest this contention in part on the fact that § 357 was adopted during the pendency of the Indian land allotment program — a program which defendants assert was repudiated with the adopted of 25 U.S.C § 461 which prohibited further allotments.

Finally, defendants point to *United States v. 10.69 Acres of Land, More or Less, in Yakima County*, 425 F.2d 317 (9th Cir. 1970), in which the Ninth Circuit ruled that unallotted tribal lands held in trust by the United States for the benefit of certain Indian tribes must be acquired for interstate highway purposes, not by way of the United States' general power to condemn lands for highway purposes, but rather by the detailed administrative procedure set forth in 23 U.S.C. §§ 107(d) and 317. Defendants conclude that this ruling is applicable by analogy to the case at hand and stands for the proposition that a specific procedure for the acquisition of rights-of-way should prevail over a general condemnation provision. Defendants note that the *10.69 Acres* Court referred to § 357 and §§ 323-324 as being "complementary" provisions. However, the distinction the Ninth Circuit seems to draw between the two procedures is that § 357 may be used to acquire lands allotted in severalty to individual Indians, whereas §§ 323-324 is to be used to acquire unallotted Indian reservation lands. The Court reasoned that allotted lands are held by individuals, and hence no conflicting governmental use is likely to be present; however, where unallotted Indian reservation lands held in trust by the United States are involved, a conflict arises between the governmental use for which the land is sought and the governmental use to which the land is already being devoted. This latter conflict necessitates resolution by a closely circumscribed administrative procedure involving the participation of the Secretaries of both Transportation and Interior. Lastly, the Ninth Circuit added the following observation:

> "Since the lands involved [in the acquisition for a highway right-of-way] were unallotted tribal lands held in trust by the United States, it is conceded that the State could not condemn them. *Compare* 25 U.S.C. § 357, which permits condemnation by the State for any public purpose of '[l]ands allotted in severalty to Indians * * *' " 425 F.2d at 318.

Finally, defendants rely on CAL. CODE CIV. PROC. §§ 1240.510 and 1240.610 which provide, respectively, that in dondemnation actions involving land already devoted to a

public use, the condemnor must allege and demonstrate that the public use for which the land is sought will not unreasonably impair the existing public use and that the public use for which the land is sought is of greater weight than the existing use. Defendants argue that plaintiff's complaint fails to state a claim because it fails to include these allegations.

However, plaintiff points to *United States v. Bowling*, 256 U.S. 484, 487, 41 S. Ct. 561, 562 (1921), noted than an Indian trust allotment — where, as here, the individual Indian is given a trust patent stating that the United States will hold the land in trust for a designated period for the sole use and benefit of the individual Indian — is subject to supervisory control by the United States "to make sure that [the allotment] inures to the sole use and benefit of the allottee . . ." Additionally, the Ninth Circuit in *Nicodemus, supra*, adopted the proposition set forth by the Eighth Circuit in *State of Minnesota, supra*, that "'[t]he land involved, being allotted in severalty, is no longer part of the reservation, nor is it tribal land. [additional language unquoted by the Ninth Circuit: "The virtual fee is in the allottee, with certain restrictions on the right of alienation. This restriction, consistent with the Government's paternal policy toward the Indians, was doubtless to protect the Indian from being over-reached in the sale of his land.]'" 264 F.2d at 618.

Despite defendants' valiant, intriguing, and well-reasoned arguments to the contrary, the § 357 condemnation procedure does seem to be a proper means to acquire the rights-of-way and easements herein sought. The Eighth, Ninth, and Tenth Circuits have all held that § 357 represents an alternative means by which rights-of-way over allotted Indian lands held in severalty may be acquired. Such lands being devoted to the sole use and benefit of the Indian allottees, plaintiff need make no greater showing than heretofore made regarding the public use to which the condemned land will be put as contrasted with the existing use.

Accordingly, there being no genuine issue as to any material fact, plaintiff Southern California Edison Company is entitled to partial summary judgment as a matter of law as to all issues relating to the propriety of plaintiff's acquisition of the interests in land sought herein. The sole issue remaining in this action is the determination of the amount of compensation to be paid to the Indian allottees for the taking of interests in their lands. Defendant's Motion to Dismiss this action for lack of subject matter jurisdiction and for failure to state a claim is hereby ORDERED DENIED.

On the issue of just compensation, IT IS ORDERED that each party to said issue:

1. Conclude all discovery not later than November 20, 1980;

2. File not later than December 10, 1980 a Memorandum of Contentions of Fact and Law, in all respects in full conformity with Local Rule 9;

3. File not later than December 20, 1980 a proposed form of Pre-Trial Conference Order, in all respects in full conformity with Local Rule 9.

The Pre-Trial Conference is set for January 5, 1981 at 10:00 a.m. There will be no continuances thereof granted.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: September 10, 1980.

ROBERT J. KELLEHER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY,
a corporation,

Plaintiff-Appellee,

v.

STEVEN ALLEN RICE; ANITA VIVIAN MILLER;
CHERYL SAUBEL MIRANDA; ELLEN RICE WARD;
BOBBIE RAY PRECKWINKLE; and
LAVERNE SAUBEL NELSON,

Defendants-
Appellants,

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

33.49 ACRES OF LAND IN THE COUNTY OF
RIVERSIDE, STATE OF CALIFORNIA;
GOODYEAR SERVICE STORES; JOHN H.
WINGATE, JR.; TIMOTHY J. WHITE;
JOHN R. STOTTS, JR.; VERNON H.
HOLBROOK, d/b/a WINGATE AIR
CONDITIONING SERVICE, partnership;
and UNKNOWN OTHERS,

Defendants.

No. 81-5725

D.C. NO. 79-3709-RJK

OPINION

Appeal from the United States District Court
for the Central District of California

Robert J. Kelleher, District Judge, Presiding

Argued and Submitted May 5, 1982

Before: ELY, SCHROEDER, and NORRIS, Circuit Judges

ELY, CIRCUIT JUDGE:

Appellants, members of the Agua Caliente Band of Cahuilla Indians, appeal from a summary judgment granted to Southern California Edison Company ("the Company") on its complaint in eminent domain. We affirm.

The Company instituted this action in federal court pursuant to 25 U.S.C § 357[1] seeking to condemn a right-of-way to install electrical transmission lines over lands allotted to the Indian appellants herein.[2] The United States, as trustee for the allottees and owner of title to the allotments, was named as defendant. *See Minnesota v. United States*, 305 U.S. 382, 389 (1939). The allottees filed an answer raising as affirmative defenses lack of subject matter jurisdiction and failure to state a claim under California eminent domain law.

[1] The section, enacted in 1901, provides: Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State of Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. 25 U.S.C. § 357.

[2] The Indians' allotments were authorized by the Act of March 2, 1917, ch. 146, 39 Stat. 969, 976, and the Agua Caliente Equalization Act of 1959, Pub. L. No. 86-339, 73 Stat. 602 (codified at 25 U.S.C. §§ 951-958 (1976)). *See Arenas v. United States*, 322 U.S. 419 (1944); *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956). Patents issued to the Indian allottees declare that the United States holds the land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 25 U.S.C § 348.

The District Court, following this Court's decision in *Nicodemus v. Washington Water Power Company*, 264 F.2d (9th Cir. 1959), held that section 357 authorized condemnation of rights-of-way over the allotments. The District Court in the present case also found that the Company had stated a claim under California eminent domain law. Pursuant to its memorandum of decision, the District Court rendered summary judgment for the Company after the parties had stipulated to the amount of compensation. The allottees reserved their right to appeal from the judgment on the issues other than just compensation and timely filed their notice of appeal.

The Indian allottees' first contention on appeal presents the issue whether land allotted in severalty to Indians, held in trust by the United States for the "sole use and benefit of the Indian," 25 U.S.C. § 348, constitutes "property appropriated to public use" within the meaning of the California eminent domain law, Cal. Civ. Pro. Code §§ 1235.180, 1240.510, 1240.610. If the allottees' land is considered "property appropriated to public use," then the Company's complaint in eminent domain is subject to dismissal for failure to allege that the public use it proposes is either compatible with or more necessary than the existing use. *See id.* §§ 1240.510, 1240.610; *Woodland School District v. Woodland Cemetery Association*, 174 Cal. App. 2d 243, 245, 344 P.2d 326, 327 (1959).

We conclude that the Indian allottees' land is not "property appropriated to a public use" within the meaning of the California eminent domain law. The state has defined "property appropriated to public use" as "property ... in use for a public purpose." Cal. Civ. Pro. Code § 1235.180. *See East Bay Municipal Utility District v. Lodi*, 120 Cal. App. 740, 750-58, 8 P.2d 532, 536-39 (1932). The California Supreme Court has construed "public use" as "'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'" *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, 665 (1982) (quoting *Bauer v. County of Ventura*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955)). Thus, "appropriated to public

use," in the context of the California eminent domain law, appears to refer to prior condemnations authorized by the California Legislature. *See, e.g., East Bay Municipal Utility District*, 120 Cal. App. 740, 8 P.2d 532.[3]

Moreover, although land allotted in severalty to individual Indians may be said to further in some sense federal policies toward Indians, the very nature of the allotment scheme and section 357 shows that these lands are not "appropriated to public use" in the sense contemplated by the California statute. The Congressional policy of allotting tribal land to individual Indians was intended to promote assimilation of Indians into American society. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 650 n.1 (1976). This policy was furthered by protecting Indians from the operation of state laws that might decrease the economic value of their allotments. *See Squire v. Capoeman*, 351 U.S. 1, 9-10 (1956); *United States v. Rickert*, 188 U.S. 432, 437 (1903).

With respect to condemnation actions by state authorities, Congress explicitly afforded no special protection to allotted lands beyond that which land in fee already received under the state laws of eminent domain. *See* 25 U.S.C § 357. Thus, consistent with its assimilation policy, Congress placed Indian allottees in the same position as any other private landowner *vis-a-vis* condemnation actions, with the interest of the United States implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds. *See Minnesota v. United States*, 305 U.S 382, 388 (1938). Although United States policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made, *see Morton v. Mancari*, 417 U.S. 535, 551 (1974), the fact that Congress has not amended or

[3] That the California Legislature intended sections 1240.510 and 1240.610 to permit an accommodation between prior and subsequent condemnations by state-authorized entities is supported by the general rule that a state may not condemn federally owned lands within its boundaries without the consent of the United States Government. *See generally* 1 J. Sackman, *Nichols on Eminent Domain* § 2.22 (3d ed. 1981).

repealed section 357 shows that the position of Indian allottees with respect to condemnation actions under state law has not changed.[4]

Thus, the status of Indian allottees under section 357 does not implicate the situation addressed by the pleading requirements of the California law concerning "property appropriated to public use." Since Congress, with respect to state condemnation actions, has chosen to have Indian allottees remain in virtually the same position as those who privately own land for their sole use and benefit, the potential for a conflict in public uses that arises when a public entity attempts to condemn land already in use for a public purpose is not presented in this situation.[5] *See, e.g., Woodland School District*, 174 Cal. App. 2d at 245-46, 344 P.2d at 327. The Company's complaint in eminent domain was not subject to dismissal under Cal. Civ. Pro. Code §§ 1240.510, 1240.610 for failure to allege a compatible or more necessary public use.

Second, the Indian allottees contend that 25 U.S.C §§ 323-324, which empower the Secretary of the Interior to grant rights-of-way "for all purposes" only with the consent of Indian allottees, is the exclusive means by which the Company may obtain its right-of-way across their allotted lands. This issue is squarely controlled by *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). Section 357, which provides that lands allotted in severalty to Indians may be condemned for any purpose in accordance with state law, *see* note 1 *supra*, is an *alternative* method for the acquisition of an easement across allotted

[4] Congress recently indicated that section 357 is still in force when it extended operation of that section, and reemphasized the applicability of sections 323-328, to the Pueblo Indians of New Mexico. *See* Act of Sept. 17, 1976, Pub. L. No. 94-416, § 3, 90 Stat. 1275; H.R. Rep. No. 800, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2368, 2369-70.

[5] That Congress consented to state condemnation of allotted Indian land "for *any* public purpose," 25 U.S.C. § 357 (emphasis added), is a further indication that Congress does not consider allotted land to be property already devoted to a potentially conflicting public use.

Indian land to which the United States has consented. 264 F.2d at 618. *Accord, Yellowfish v. City of Stillwater*, No. 81-1948 (10th Cir. April 28, 1982); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940).

United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), does not contradict the holding in *Nicodemus*. In 10.69 Acres we analogized sections 323 and 357 to comparable provisions in Title 23 and concluded that Congress intended to protect *tribal* lands, and not alloted lands, from the condemnation procedures set forth in 23 U.S.C. § 107(a). 425 F.2d at 319-20.[6] The Tenth Circuit's reasoning in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), likewise does not aid the allottees' case. *Plains Electric* is inapposite to a construction of section 357 because it involved a statute providing for the condemnation of communally owned Indian land, not land allotted in severalty as provided for in section 357. *See Yellowfish*, slip op. at 6-8.

The allottees contend finally that California jurisdiction and venue provisions, requiring that suits in eminent domain shall be commenced in California superior court, had "disabled" the Company from bringing this action in federal court. This contention is without merit. Condemnation proceedings pursuant to 25 U.S.C § 357 must be brought in federal court. *Minnesota v. United States*, 305 U.S. 382, 389 (1939). The state through its own jurisdictional provisions cannot strip a federal court of jurisdiction that Congress has conferred to it over suits involving state-created rights. *See Markham v. City of Newport News*, 292 F.2d 711, 713 (4th Cir. 1961); *cf. Oklahoma Gas & Electric Co. v. United States*, 609 F.2d 1365, 1366 n.1 (10th Cir. 1979) (state does not by virtue of section 357 acquire the right to use state procedure or laws in condemnation suits under

[6] Moreover, we are bound to the holding in *Nicodemus* until such time as an en banc panel of this Court overrules it. *Upton v. Commissioner*, 283 F.2d 716, 723 (9th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961).

that section). Moreover, the Federal Rules of Civil Procedure explicitly provide that the Federal Rules, and not state venue provisions, are to apply in actions involving the exercise of the power of eminent domain under state law. Fed. R. Civ. P. 71A(a), (k).

The judgment of the District Court is

AFFIRMED.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTE:

Apparently the Court of Appeals has not prepared a separate document as its judgment in this case. However, it did send to petitioner's counsel of record, along with a copy of its opinion which was filed on August 26, 1982, a document entitled "Notice of Entry of Judgment" which states that "Judgment was entered in this case as of the file stamp date on the attached decision of the court."

If the petition is granted, or if the Court should so desire, counsel for petitioner will obtain such a separate document embodying the judgment of the Court of Appeals, if such a separate document exists or can be prepared.